83-2117

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

ASSOCIATION OF AMERICAN RAILROADS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NELSON J. COONEY
KENNETH E. SIEGEL
1616 P Street, N.W.
Washington, D.C. 20036
(202) 797-5347
Attorneys for
American Trucking
Associations, Inc., *et al.*

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
JOAN M. DARBY
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
International Brotherhood of
Teamsters

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

For over forty years railroads (and railroad affiliates) have been granted motor carrier operating authority other than that which is auxiliary to and supplemental of rail service only if the applicant can establish "special circumstances" negativing any disadvantage to the public from the fact that it is a railroad. In a series of decisions, culminating in *American Trucking Assns. v. U.S.*, 364 U.S. 1, this Court has held that this "special circumstances" doctrine is a Congressional mandate under the Interstate Commerce Act. The Motor Carrier Act of 1980 and the Staggers Rail Act of 1980 amended the Interstate Commerce Act to a substantial extent, but retained the statutory provisions on which the "special circumstances" doctrine was held to rest. The question presented is:

Is the Interstate Commerce Commission empowered to abandon the "special circumstances" doctrine, thereby permitting unrestricted entry of railroads into motor carrier operations?

PARTIES IN THE COURT BELOW

American Trucking Associations, Inc.

American Movers Conference

Common Carrier Conference-Irregular Route

Film, Air and Package Carriers Conference

Mississippi Trucking Association

National Automobile Transporters Association

Oilfield Haulers Conference

Regular Common Carrier Conference

Specialized Carriers & Rigging Association

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Interstate Commerce Commission

United States of America

Association of American Railroads

Texas and Northern Railway Company, Inc.

Lesco Trucking Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The opinion of the Interstate Commerce Commission in the rulemaking proceeding Ex Parte No. MC-156 is reported at 132 M.C.C. 978. It is reproduced at pp. 1a-28a of the separately bound appendix to this petition ("App."). The opinion of the Court of Appeals denying a petition for review of that proceeding is reported at 722 F.2d 1243, and is reproduced at App. 29a-48a. In the same decision the Court of Appeals also dismissed a petition to review the Commission's decision in Case No.

MC-78786 (Sub-No. 281)F. That decision of the Commission is not reported and is reproduced at App. 51a-58a. The opinion of the Court of Appeals staying the proceedings on review of that decision is reported at 682 F.2d 487 and is reproduced at App. 59a-70a.

JURISDICTION

The decision of the Court of Appeals was issued on January 20, 1984 and a timely petition for rehearing was denied on February 22, 1984. On May 12, 1984 Justice White signed an order extending the time for filing this petition to June 22, 1984. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 2321 and 2342(5).

STATUTORY PROVISIONS INVOLVED

This case involves the Interstate Commerce Act ("ICC"), 49 U.S.C. § 10101 *et seq.*, as amended by the Motor Carrier Act of 1980, P.L. 96-296, 94 Stat. 793, and the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895. The pertinent provisions are reproduced at App. 71a-79a.

In 1978, Congress codified the ICA as it then stood as 49 U.S.C. § 10101 *et seq.* It may, therefore, be helpful to set forth the changes in the nomenclature of the statutory provisions which will be referred to herein:

The presently pertinent provision of the National Transportation Policy was embodied in a preamble to the 1940 amendments to the ICA, 54 Stat. 899; it is codified at 49 U.S.C. § 10101(a)(1)(A). The "rail carrier" proviso to § 5(2)(b) of the ICA, 54 Stat. 906, is now codified as 49 U.S.C. § 11344(c). Sections 207 and 209 of the ICA, 49 Stat. 551-552, dealing with the licensing of common carriers and contract carriers respectively, were codified as 49 U.S.C. §§ 10922 and 10923; these provisions were substantively amended in the Motor Carrier Act of 1980.

STATEMENT OF THE CASE

This petition grows out of a major rulemaking proceeding before the Interstate Commerce Commission ("ICC" or "Commission"), entitled Ex Parte No. MC-156. The ICC therein first proposed and then determined to abandon the longstanding "special circumstances" doctrine. Under that doctrine, railroads and railroad affiliates may be granted motor carrying operating authority only insofar as it is "auxiliary to or supplemental of train service", unless the applicant can demonstrate "special circumstances" justifying an exception to that limitation. See pp. 3-5, *infra*. As we discuss hereinafter, the doctrine has been approved by this Court as a mandate of *Congressional* policy in the Interstate Commerce Act in a series of decisions culminating in *American Trucking Assns. v. U.S.*, 364 U.S. 1. The ICC concluded that the doctrine is no longer viable in light of the amendments to the Interstate Commerce Act in the Motor Carrier Act of 1980 and the Staggers Rail Act of 1980. The question presented by this case is whether the court below correctly concluded that the ICC was empowered by those amendments to make this far-reaching change, although the 1980 amendments left intact the provisions on which the doctrine is based.

A. The History of and Statutory Basis for the "Special Circumstances" Doctrine

In its decision, the Commission described the doctrine at issue in this case as follows:

> The "special circumstances" doctrine requires the restriction to incidental rail service of motor carrier operating authority issued to railroads or rail affiliates in licensing proceedings unless special circumstances are shown that unrestricted authority is required to fulfill a compelling public need for service not being offered by independent motor carriers. The aim of the doctrine is to prevent rail domination of motor carrier markets. [App. 2a]

The Commission also set forth the history of the doctrine within the agency and its statutory basis:

> The "special circumstances" doctrine has its origins in the earliest days of the Commission's regulation of motor carriers. The underlying policy against granting unrestricted motor carrier operating authority to railroads or their affiliates originated in the motor-rail acquisition and control section 213 (a) (1) of the Interstate Commerce Act as amended by the Motor Carrier Act of 1935. This legislation prohibited a railroad from acquiring or merging with a motor carrier "unless * * * the transaction * * * [would] promote the public interest by enabling the [rail] carrier * * * to use service by motor vehicle to public advantage in its operations and not unduly restrain competition." Pursuant to this statutory language, the Commission restricted motor operations resulting from rail-motor acquisitions proceedings to those auxiliary or supplemental to rail service. See *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101 (1936). The rationale for this policy was to protect the nascent motor carrier industry from anticompetitive control by the more mature railroads with their dominant size and great financial resources. *Id.* at p. 112.
>
> Although there was no express statutory requirement for doing so, this principle was extended to motor carrier licensing proceedings under sections 207 and 209 of the act. See *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M.C.C. 221, 240-41 (1938) (The Commission found that the motor carrier applicant's affiliation with a railroad required imposition of specific auxiliary-to-rail restrictions). The basis for this was both the Commission's interpretation of the acquisition section 213(a) (1), and the requirements of the Declaration of Policy of the Motor Carrier Act of 1935, which provided that the Commission was—
>
> > to regulate transportation by motor carriers in such manner as to recognize and preserve the

> inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, * * * improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers * * *.

The "special circumstances" doctrine itself was a departure from the strict requirement of imposing auxiliary-to-rail restrictions on motor carrier authority issued to railroads or rail affiliates in licensing proceedings. The doctrine allowed issuance of unrestricted authority where the rail-affiliated applicant could show a "compelling need" for its service by demonstrating (1) that a grant of unrestricted authority would not result in undue restraint of competition, and (2) that the public interest requires the proposed operation which was not being furnished by independent motor carriers. See *e.g., Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457 (1946). [App. 4a-6a, footnote omitted]

In *Rock Island*, the ICC had explained:

> In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden . . . by reason of the very circumstance that it is a railroad. Where it fails to show special circumstances negativing any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified. [40 M.C.C. at 474]

The foregoing formulation was quoted with approval by this Court in affirming the *Rock Island* decision (*United States v. Rock Island Co.*, 340 U.S. 419, 428-429, n.4) and again in *American Trucking Assns. v. U.S.*, 355 U.S. 141, 151 (*"ATA I"*).

In *ATA I* the Court affirmed the grant to a railroad subsidiary of authority to supply motor service which was not auxiliary to and supplemental of train service because special circumstances had been shown, but stressed

> that the underlying policy of § 5(2)(b) must not be divorced from proceedings for new certificates under § 207. Indeed, the Commission must take "cognizance" of the National Transportation Policy and apply the Act "as a whole." [355 U.S. at 151-152]

And in *American Trucking Assns. v. U.S.*, 364 U.S. 1 (*"ATA II"*), this Court held that the Commission had commited an error of law by issuing unrestricted motor carrier operating authority without finding that special circumstances justified such a grant. (*Id.* at 6-15, discussed at pp. 9 to 11, *infra.*)

B. The Proceedings in this Litigation

1. *The Commission's Rulemaking Proceeding*

By a notice of proposed policy statement, served October 9, 1981, and published at 46 F.R. 50,423 (October 13, 1981), Ex Parte No. MC-156, the ICC sought public comment on the "continued viability" of the "special circumstances" doctrine in light of the 1980 amendments to the Interstate Commerce Act. (App. 1a-2a.) In that proceeding comments were received from motor carrier and rail carrier interests, shippers, freight forwarders, and the United States Department of Transportation ("DOT"). As the Commission observed, "railroads, rail affiliated motor carriers and DOT favor[ed] abolition of the doctrine," whereas "[s]hippers, freight forwarders and independent motor carriers argue[d] for [its] retention." (App. 2a.) The ICC concluded "that the 'special circumstances' doctrine should be eliminated from motor carrier licensing proceedings." (App. 3a.)

First, the Commission asserted that "[t]he 'special circumstances' doctrine is not a viable policy under the

newly revised Interstate Commerce Act." (Heading, App. 3a.) It observed that at "the heart of [the 1980 Motor Carrier Act] is the mandate for eased regulatory entry requirements offering 'increased opportunities for new carriers to get into the trucking business and for existing carriers to expand their services'[; the] new licensing provisions at 49 U.S.C. 10922 and 10923 markedly reduce the burden of proof of those seeking motor carrier authority and substantially increase the burden of proof of those opposing the issuance of motor carrier authority." [1] Also, the "Staggers Rail Act of 1980 endorses more competitive, less restricted rail operations and stresses minimized federal control over the rail transportation system." (App. 3a.) The ICC opined that *ATA I* and *ATA II* no longer have "precedential value" because (1) the "special circumstances" doctrine did not establish an absolute bar to the licensing of rail affiliates to perform non-rail-related motor service, and (2) after those decisions "circumstances and the transportation legislation have changed markedly." (App. 10a-11a.) The ICC asserted that "the special circumstances doctrine is an *agency* 'created and transformed' doctrine" and as such is not "immutable" but "must change with the changing realities of the economy and the industries regulated by the Commission." (App. 11a, emphasis added.)

Two of the Commissioners who joined in the ICC's decision also filed a separate statement in which they expressed regret that that policy statement applied only to "intermodal licensing," but "does not announce a change in intermodal acquisition policy." (App. 19a.)

2. *Proceedings in the Court of Appeals*

American Trucking Associations, Inc. and others which had opposed abandonment of the "special circumstances" doctrine petitioned for review of the ICC's decision in

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[1] App. 3a, quoting H.R. Rept. 1069, 96th Cong., 2d Sess. 3 (1980).

the court below.[2] The International Brotherhood of Teamsters, which represents employees in the trucking industry, intervened in support of that petition. The Association of American Railroads and other railroads intervened on the side of the ICC and the United States in support of the agency decision.

The Court of Appeals acknowledged "the broad language * * * in *ATA II* that 'the transportation legislation' required the application of the special circumstances doctrine in that case." (App. 39a.) Nevertheless, the court believed that this Court's opinions approved "the *Commission's* interpretation of its statute" and that this Court did not go "as far as to state according to its own interpretation of the I.C.A. that the restrictions of acquisitions proceedings also had to be applied in licensing proceedings." (App. 40a, emphasis in original.) Treating the issue as legitimately open, the court adopted a highly deferential standard—whether the Commission's "interpretation 'has a reasonable basis in law.'" (App. 38a.) On that basis the court concluded:

> Petitioners' arguments against the Commission's interpretation are strong. Nevertheless, we are persuaded of the reasonableness of the Commission's position that the new I.C.A., as amended in 1980, permits the abrogation of the special circumstances doctrine in licensing proceedings. We do not say that the new Act requires the Commission to treat rail-affiliated licensing applicants on the same footing as other applicants. We hold that the Commis-

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[2] The Court of Appeals consolidated that petition for review with a petition which had been previously filed to review an ICC grant of motor carrier authority to Pacific Motor Trucking Company ("PMT"), a rail-affiliated motor carrier, without a finding of "special circumstances". See MC-78786 (Sub.-No. 281) F, Pacific Motor Trucking Company Extension-Nationwide General Commodities, reproduced at App. 51a-58a. The court had previously stayed its consideration of that petition for review pending the Commission's disposition of the rulemaking proceeding. See App. 59a-70a.

sion's decision was permissible as measured by our standard of review. [App. 38a]

Accordingly, the Court of Appeals denied the petition for review.[3]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A SERIES OF DECISIONS OF THIS COURT AND WITH A LONGSTANDING, UNALTERED CONGRESSIONAL POLICY

A. The fundamental error committed by the Commission and the Court of Appeals was their position that the "special circumstances" doctrine was approved by this Court as a matter of Commission policy rather than as a Congressional mandate binding on the Commission. They thus failed to follow this Court's governing decisions, of which the most recent in the series, *ATA II*, is especially revealing. We shall, therefore, discuss that opinion in some detail.

In describing the history and statutory basis of the doctrine the Court began: "Both the Commission and this Court have recognized that *Congress* has expressed a strong general policy against railroad invasion of the motor carrier field," referring to the National Transportation Policy, 54 Stat. 899 and the proviso to § 5(2)(b) of the ICA. (364 U.S. at 6, emphasis added.) The Court observed that it had "confirmed the correctness of the Commission's conception of its responsibilities under both § 5(2)(b) and § 207". (*Id.* at 7, citing *Rock Island Co., supra*; *United States v. Texas & Pac. Co.*, 340 U.S. 450; *I.C.C. v. Parker*, 326 U.S. 60.) And the Court noted that in the *Rock Island* case it had "taken cognizance of the congressional confirmation of the Commission's policy by the 1940 re-enactment in § 5(2)(b) of the provisions of

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[3] The court also denied the petition for review in the *PMT* case, p. 8, n.2, *supra*. PMT is a respondent in this Court.

§ 213(a) [of the 1935 Motor Carrier Act] after some of the pertinent Commission decisions had been specifically called to Congress' attention." (*Id.*)

Thus, "the policy of opposition to railroad incursions into the field of motor carrier service" (364 U.S. at 7) was plainly viewed as *Congress'* policy. So, too, in approving the Commission's implementation of that policy to restrict "certificates issued to rail carriers or their affiliates in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supplemental of train service," the Court said:

> If a trucking service can fairly be so characterized, it is clear enough that there is compliance with the mandate of § 5(2)(b) that the carrier should be able "to use service by motor vehicle to public advantage *in its operations.*" But if, on the other hand, the motor transportation is essentially unrelated to rail service, the railroad parent is invading the field of trucking, and, under normal circumstances, the National Transportation Policy is thereby offended. [364 U.S. at 9, emphasis in original]

The Court reaffirmed its holdings in *ATA I* that the public interest may sometimes be promoted by not imposing the "auxiliary and supplemental" restrictions on motor carrier subsidiaries of railroads, but that this exception has only a narrow scope:

> We there observed that the mandatory provisions of § 5(2)(b) do not appear in § 207, and approved the Commission's policy of not attaching auxiliary and supplemental restrictions where "special circumstances" prevail. We concluded:
>
> > "We repeat . . . that the underlying policy of § 5(2)(b) must not be divorced from proceedings for new certificates under § 207. Indeed, the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.' But . . . we do not believe that the Commission acts beyond its statutory

> authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding." 355 U.S., at 151-152. [364 U.S. at 11]

Because the ICC had granted to a railroad subsidiary motor carrier authority without attaching "auxiliary and supplemental" restrictions, and without making a finding of "special circumstances," this Court set aside the ICC's decision, saying:

> [W]e do not believe that the policy of the Act allows the Commission to authorize service by Pacific Motor, limited only to points on the Southern Pacific line, simply because General Motors [the shipper] wants a contract carrier operation. If that desire of General Motors, in combination with the policy of the Act, disables a railroad subsidiary from obtaining the business, that is simply the result of the National Transportation Policy. This consequence, we believe, does not meet the compelling public interest standard established by [*ATA I*]. A contrary conclusion would open the door to approval of over-the-road contract trucking by railroad subsidiaries to most, if not virtually all, major destinations, and hence would greatly attenuate the safeguards which have been painstakingly erected to prevent railroad domination of trucking. Appellees say that these safeguards are no longer needed, because independent trucking is no longer an "infant industry." This is an immaterial argument in this forum. *We do not condemn the wisdom of the Commission's action. We simply say that the transportation legislation does, and that the pardoning power in this case belongs to Congress.* [364 U.S. at 15, emphasis added]

The Court concluded:

> Thus the decision of the District Court must be reversed, because we conclude that the Commission fell into error of law. [364 U.S. at 15] [4]

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[4] The Court remanded the case to the ICC to consider whether the record would support a finding that there exist special circumstances warranting an unrestricted certificate. (364 U.S. at 15-17.)

The view expressed by the Commission and the Court of Appeals in the present case, that the "special circumstances" doctrine is merely a matter of agency policy, cannot be reconciled with either the reasoning of the *ATA II* opinion, or with the result in that case.[5]

B. Congress has not exercised its "pardoning power" to ease the restrictions on the motor carrier operations of railroads and their subsidiaries. The statutory underpinnings of the "special circumstances" doctrine were left unaltered by the 1980 amendments to the Interstate Commerce Act. That portion of the National Transportation Policy "which articulates the congressional purpose that the Act be 'so administered as to recognize and preserve the inherent advantages' of 'all modes of transportation'" (364 U.S. at 6), remains in the Act as 49 U.S.C. § 10101(a)(1)(A). (App. 71a.) So too, what was

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[5] In "considering the precedential value of" *ATA I* and *ATA II*, the ICC's opinion herein emphasized what it regarded to be "two quite significant points." (App. 10a.) The first of these "is that the Court, even under the old national transportation policy, was satisfied to permit departures in the licensing area when circumstances warranted." (*Id.*) The Commission's reliance on this proposition is unexplained and inexplicable. It is a total *non sequitur* to argue from the fact that the Court allowed "departures" from the auxiliary and supplemental restrictions "when circumstances warranted" (that is, when the ICC found special circumstances negativing any disadvantage to the public from the fact that the applicant is a railroad subsidiary) that such restrictions may be dispensed with when no such finding is made. The "precedential value" of the *ATA* decisions inheres both in their recognition of this "special circumstances" exception and their holding that in the absence of such a finding a railroad subsidiary may not be granted general motor carrier operating authority.

The Commission's second point in attempting to distinguish the *ATA* decisions is that "the Court's interpretation [of the ICA] is based on the statute as then written." (App. 10a.) So, indeed, it was. But, while "[i]n the two decades since, circumstances and the transportation legislation have changed markedly" (App. 10a-11a), the provisions of the ICA on which the *ATA* decisions were based have not changed. See pp. 12-14, *infra*.

§ 5(2)(b) of the ICA is retained as 49 U.S.C. § 11344 (c). (App. 79a.)

A railroad spokesman, testifying in general support of an early version of what became the Staggers Rail Act, discussed the "special circumstances" doctrine, and criticized as a significant "omission" the failure of the bill to overturn that doctrine.[6] Congress did not respond favorably to this plea.

In short, it is impermissible to extrapolate from Congress' amendment of the certification provisions of the Interstate Commerce Act to the conclusion that Congress

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[6] Walter G. Treanor, senior vice-president-law of The Western Pacific Railroad Company, testified:

> Insofar as the bill [S. 796] is concerned, we have only one concern of omission, although we understand the reason for it at this time, and this is that *this bill does not propose to strike down the artificial restraints that are in the present statute on the railroads becoming total transportation companies.* . . . [A]s a direct consequence of legislative and administrative restrictions, the railroads with a few notable exceptions are generally effectively foreclosed from engaging in common carrier motor services except where such services are structured so as to be strictly auxiliary of, and supplemental to, the existing rail lines. *Statutory limitations presently set forth in 49 U.S.C. (Transportation) 11344 require special, and debilitating, findings before any railroad is permitted to effect a merger with, or control of, a motor carrier.* Although there do not exist any similar statutory restrictions with regard to railroad applications to obtain a Certificate of Public Convenience and Necessity to commence a new motor carrier operation, the *Interstate Commerce Commission, at least until very recently, has as a matter of policy imposed similar restrictions in certification cases.* We are very much encouraged by the [ICC's] recent loosening of such restrictions in non-merger cases but *legislative changes are necessary if this program is to have any assurances of continuation into the future.*

Railroad Deregulation Act of 1979: Hearings on S. 796 Before the Senate Subcomm. on Surface Transportation of the Sen. Comm. on Commerce, Science, and Transportation, 96th Cong., 1st Sess. 221, 223-224 (Part I, 1979).

has abandoned the "special circumstances" doctrine. The fallacy in the Commission's reasoning readily appears when we recall the Commission's formulation of the doctrine in *Rock Island*, which this Court has twice explicitly adopted, see p. 5, *supra*. Because the "new licensing provisions at 49 U.S.C. 10922 and 10923 markedly reduce the burden of proof of those seeking motor carrier authority and substantially increase the burden of proof of those opposing the issuance of motor carrier authority" (App. 3a), a railroad applicant, in common with all others, is relieved of the obligation to prove "that its service is required by public convenience and necessity" (340 U.S. at 428, n. 4; 355 U.S. at 151). But the new licensing provisions do *not* affect the "special burden" imposed "by reason of the very circumstance that it is a railroad * * * to show special circumstances negativing any disadvantage to the public from this fact * * *." (*Id.*) That burden, which derives from provisions of the Interstate Commerce Act which were not changed, remains because Congress did not choose to lift it.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT GOVERNING THE REVIEW OF ADMINISTRATIVE AGENCY RULINGS

The Court of Appeals judged the Commission's decision by the deferential standard of whether it has "a reasonable basis in law". (App. 38a.) In so doing, the court clearly departed from this Court's teachings. For once it is recognized, contrary to the Court of Appeals' view (see App. 39a-40a), that the "special circumstances" doctrine was endorsed by this Court as a matter of Congressional mandate, rather than Commission policy, it becomes indisputable that an entirely different standard should have been applied:

> The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results

in the unauthorized assumption by an agency of major policy decisions properly made by Congress.[7]

Precisely because we are here concerned with a Congressional policy, confirmed by the decisions of this Court, the Court of Appeals erred in relying on the "*piggyback*" case, *American Trucking v. A., T. & S.F. R. Co.*, 387 U.S. 397. (See App. 41a.) For there, in contrast to this case, the Commission had altered what was solely its own policy. We agree that "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, *within the limits of the law* and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." (*Id.* at 416, emphasis added.) But here, the Commission did not act "within the limits of the law" because it disregarded a statutory mandate which Congress did not choose to alter. Nothing that was decided or said in the *piggyback* case disturbs the plenary authority of Congress to decide to what extent "new developments" (*id.*) should result in a change of transportation policy.

We have shown in Point I hereof, that the Commission's decision cannot be sustained if it is judged by the correct legal standards. It bears emphasis, however, that the court below rejected our submission "that repeal of the special circumstances doctrine in licensing proceedings would fall into the category of a 'repeal by implication,'" only because it viewed the doctrine as "rather simply a Court-approved Commission interpretation of its statute." (App. 39a, 40a.)[8] Since Congress retained the

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[7] *American Ship Bldg. v. Labor Board*, 380 U.S. 300, 318, quoted with approval in, *e.g.*, *Bureau of Alcohol, Tobacco & Firearms v. Labor Relations Authority*, —— U.S. ——, 104 S.Ct. 439, 444.

[8] On this erroneous premise, the Court ruled that the "Commission need not meet the difficult burden of proving that the new I.C.A. provisions present the 'irreconcilable conflict' necessary to find a repeal by implication [but] must meet the much easier burden necessary to justify a change in a longstanding policy or interpretation by an agency of its statute." (App. 40a.)

statutory provisions on which the doctrine rests, it would be highly anomalous to conclude that that doctrine had been impliedly repealed by Congress. Indeed, "the fact that a comprehensive reexamination and significant amendment of the [ICA] left intact the statutory provisions under which [this Court declared the "auxiliary and supplemental" restrictions to be part of the Congressional transportation policy] is itself evidence that Congress affirmatively intended to preserve that [policy]." Cf. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-382. See also *Bob Jones University v. United States*, —— U.S. ——, 103 S. Ct. 2017, 2033-2034 (Op. of the Court), 2036-2037 (Op. of Powell, J.).

The Court of Appeals should have reversed the Commission's decision because "the Commission fell into error of law." (*ATA II*, 364 U.S. at 15.)

III. THE QUESTION IS IMPORTANT TO THE ECONOMIC HEALTH OF THE MOTOR CARRIER INDUSTRY

In *Rock Island*, this Court succinctly stated the economic reason why the "auxiliary and supplemental" limitation on railroad motor carrier operations was in furtherance of the National Transportation Policy:

> [O]therwise the resources of railroads might soon make over-the-road truck competition impossible, as unregulated truck transport, it was feared, might have crippled some railroads. Motor transportation then would be an adjunct to rail transportation, and hoped-for advancements in land transportation from supervised competition between motors and rails would not materialize. The control of the bulk of rail and motor transportation would be concentrated in one type of operation. Complete rail domination was not envisaged as a way to preserve the inherent advantages of each form of transportation. [340 U.S. at 432-433, footnote omitted]

If the decision below is permitted to stand, the way for rail domination of land transportation will have been cleared. Despite substantial significant changes in the trucking and railroad industries (to which Congress responded with the 1980 amendments) the power of the railroads to dominate the motor carrier field if their entry is unrestricted is undiminished. They possess vast economic resources which enable them to undertake motor carrier operations where to do so would serve their corporate objectives. For example, the four largest United States transportation companies, ranked by assets, are railroads; the largest trucking company ranks twenty-first. Seven railroad corporations have assets of more than $1 billion (including three with assets of more than $10 billion); only one trucking company has more than $1 billion in assets. See the Supplemental Appendix hereto.

The Commission now believes that unrestricted competition by railroads in the motor carrier field is desirable and has abandoned the "special circumstances" restrictions to accomplish that result. We submit that the Commission has thereby exceeded its statutory authority, and that the court below should have so held. See pp. 9-16, *supra*. But whatever doubt there may be on that score, it cannot be gainsaid that the decision below portends a drastic transformation of the motor carrier industry and of rail-motor competition generally. For this reason, too, plenary review of the decision below is clearly warranted.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NELSON J. COONEY
KENNETH E. SIEGEL
1616 P Street, N.W.
Washington, D.C. 20036
(202) 797-5347
Attorneys for
American Trucking
Associations, Inc., *et al.*

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
JOAN M. DARBY
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
International Brotherhood of
Teamsters

SUPPLEMENTAL APPENDIX

THE FIFTY LARGEST TRANSPORTATION COMPANIES

(Source: Fortune Magazine, June 11, 1984, pp. 188-189)

TABLE I—TRANSPORTATION COMPANIES RANKED ACCORDING TO ASSETS

Rail

Company	*Rank*	*Assets*
Santa Fe Southern Pacific	1	$11.4B
Burlington Northern	2	$10.9B
CSX	3	$10.8B
Norfolk Southern	4	$ 8.2B
Illinois Central Gulf RR	15	$ 1.9B
Chicago & North Western Transportation	19	$ 1.3B
Chicago Milwaukee St. Paul & Pacific RR	25	$ 1.0B
Rio Grande Industries	32	$ .8B
Kansas City Southern Industries	34	$ .7B

Motor

Company	*Rank*	*Assets*
McLean Industries	21	$ 1.1B
Consolidated Freightways	27	$ .9B
Roadway Services	30	$ .8B
Yellow Freight System	39	$ .6B
Overnite Transportation	43	$ .2B
Arkansas Best	44	$ .2B
Carolina Freight	45	$ .2B
American Carriers	47	$ .1B

TABLE II—TRANSPORTATION COMPANIES RANKED ACCORDING TO OPERATING REVENUES

Rail

Company	*Rank*	*Operating Revenue*
Santa Fe Southern Pacific	1	$6.3B
CSX	4	$5.7B
Burlington Northern	6	$4.5B
Norfolk Southern	11	$3.1B
Illinois Central Gulf RR	25	$ .9B
Chicago & North Western Transportation	28	$ .9B
Kansas City Southern Industries	42	$ .4B
Chicago Milwaukee St. Paul & Pacific RR	44	$ .4B
Rio Grande Industries	46	$ .3B

Motor

Company	*Rank*	*Operating Revenue*
Consolidated Freightways	16	$1.3B
Roadway Services	19	$1.2B
Yellow Freight System	22	$1.1B
McLean Industries	30	$ .8B
Arkansas Best	36	$ .5B
Overnite Transportation	47	$ .3B
Carolina Freight	48	$ .3B
American Carriers	50	$ .3B